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No. 06-236

IN THE

Supreme Court of the United States

Oscar Manuel Garcia y Garcia, Petitioner

v.

United States of America, Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the 11th Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In his petition for certiorari, Mr. Garcia urged this Court to examine whether Article I of the Constitution provides Congress with carte blanche to criminalize whatever conduct committed by foreign nationals on foreign ships on the High Seas it chooses. Petitioner argued that such a reading of Article I, though linguistically possible, contravened the structure of Article I, its history, the writings of contemporary commentators, and the reasoning in early court decisions. Moreover, petitioner argued that, in light of the current disagreement among the courts of appeals as to Congress's power to criminalize conduct by foreign nationals on foreign ships, this Court should grant certiorari to provide guidance.

In response, the government argues that the plain language of Article I permits Congress to define and punish all felonies on the High Seas irrespective of nationality and flag of the vessel; that, in any event, Congress consistent with Article I can punish drug trafficking on the High Seas; that the split among the courts of appeals should not induce this Court to grant certiorari; and that the important foreign policy issues raised by Congress's broad exercise of authority should remain the province of the administration and Congress, not courts. None of the arguments are persuasive.

1. Construction of the High Seas Clause

The government argues that "the High Seas clause authorizes Congress to punish any felony committed on the High Seas without limitation," opp. at 4, and continues that "[t]here is no requirement that the felony prohibited must have some demonstrated effect on the United States' relations with foreign powers." *Id.* To support that expansive view, the government cites only the text of the High Seas Clause itself.

The government's plain language argument ignores the very structure of the constitutional clause it interprets. Petitioner in his opening brief argued that such a plain meaning approach would render Congress's correlative powers to define and punish "Piracies" and "Offences against the Law of Nations" superfluous. All "piracies" and "offences against the Law of Nations" can be defined as felonies. The government does not even suggest a response.

Moreover, the government's interpretation is ahistorical. Influential commentators at the time of the Founding wrote that the Constitution vested in Congress only the power to define and

punish felonies that interfered with the United States' relations with foreign powers. Madison, for instance, asserted that the purpose of the Clause was to "regulat[e] the intercourse with foreign nations,"[1] and William Rawle wrote soon after in his constitutional treatise that Congress under the High Seas Clause could not punish "the citizens or subjects of a foreign state sailing under its flag."[2] Indeed, our nation's very history confirms those commentators' views, because it would have been unthinkable for the Constitution of the fledgling nation to have authorized Congress to punish transgressions on French, British, or Spanish ships that had no connection to the United States. The surrounding constitutional provisions provided Congress with the means to *prevent* embroiling the new nation into international conflict, not to impose whatever norms it wished to extraterritorially.

Furthermore, the government has no comment on the long tradition in Great Britain, the dominant sea power of the day, disclaiming the power to exercise jurisdiction over crimes on the High Seas committed by foreign nationals on foreign ships. In explicating the "limits of the legislative power of this country and of the jurisdiction of its Courts" in *Queen v. Keyn*, 1876 L.R. 2ex. D. 63, 89, Lord Lindley summarized the prevailing view that "[n]o state has any power to legislate save over its own subjects and over persons on board ships carrying its flag."

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[1] *The Federalist* No. 42 [James Madison] 264 (New American Library 1961).

[2] William Rawle, *A View of the Constitution of the United States* 106-09 (2d ed., Philadelphia 1929).

With respect to precedent in our own nation, the government only pays lip service to the reasoning in this Court's early discussion of the High Seas Clause. It relies on *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), for the proposition that "there can be no doubt of the right of the legislature to enact laws punishing pirates." Opp. at 6 (citing *Palmer*, 16 U.S. at 630-31). Petitioner of course agrees that Congress has the power to punish *piracy*; the question rather is whether the Constitution vests Congress with the power to define any *felony* it wishes to and punish that conduct on the High Seas. In that respect, Chief Justice Marshall's opinion in *Palmer* is telling, for he asserted that "it cannot be supposed that the legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government . . . These are offenses against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are." *Id.* at 632. And, in *United States v. Furlong*, 18 U.S. 184 (1820), this Court cautioned against interpreting statutes to cover the conduct of foreigners on foreign vessels for "if, by calling murder piracy, [Congress] might assert a jurisdiction over that offense committed by a foreigner in a foreign vessel, what offense might not be brought within their power by that same device?" *Id.* at 198. *Palmer* and *Furlong* plainly evince the understanding of the time that the Constitution limited Congress's power under the High Seas Clause to define only felonies that threatened the United States' relations with foreign powers.

Finally, the government suggests that, even if its broad construction of the High Seas

Clause violates Article I, "the MDLEA falls comfortably within that authority," opp. 4, both because of the international opprobrium toward drug trafficking and because of the consent of the foreign flag vessel. Although drug trafficking is widely condemned so is murder, assault, IP fraud, and a host of other anti-social conduct. The Constitution vests Congress with the power in the High Seas Clause to protect the United States's relations with foreign powers, not to pick and choose among felonies that nations abhor. Moreover, the consent of the flag state is not relevant: the Constitution does not vest in Congress the power to act as a world policeman and apply U.S. law to foreign nationals outside our borders when a foreign state concurs. Otherwise the theory of enumerated powers would crumble whenever a state, locality, or foreign national would agree to congressional regulation that would otherwise fall outside of Article I.

2. Disagreement Among the Lower Courts

The government concedes (opp. at 7) that the Ninth Circuit in *United States v. Perlaza*, 439 F.3d 1149 (9th Cir. 2006), disagreed with the approach of the court below in holding that the government must show a sufficient nexus between the conduct condemned and the United States – a showing not attempted here -- to permit a MDLEA prosecution to proceed. It argues, however, that this Court should deny certiorari because petitioner's claim focused on the ambit of the High Seas Clause itself as opposed to the Due Process Clause. The Ninth Circuit's decision in *Perlaza*, however, only highlights the need for this Court to provide guidance to the courts below, and the

disagreement among the lower courts is far deeper than suggested by the government.

As an initial matter, the Ninth Circuit recently reaffirmed its reasoning in *Perlaza* in *United States v. Zakharov*, 2006 U.S. App. LEXIS 28203 (Nov. 15, 2006): "we require a sufficient nexus between the United States and the defendant's activities before exerting jurisdiction over foreign vessels." *Perlaza*'s due process reasoning is the mirror image of the Article I argument raised below – because Congress lacked the authority to vest jurisdiction in the federal courts over the conduct charged, petitioner's due process rights were violated.

More importantly, the government ignores that a number of courts of appeals under the MDLEA's predecessor statute required such a nexus. For instance, the Second Circuit in *United States v. Pinto-Mejia*, 728 F.2d 248, 260 (2d Cir. 1983), stated that, under international law principles woven into the statute, nexus was required before prosecuting a foreign national on a foreign ship, and the district court in *United States v. Greer*, 956 F. Supp. 531 (D. Vt. 1997), followed that approach in holding that it would require a nexus for any MDLEA prosecution. Thus, in light of the disarray among the lower courts, this Court should grant certiorari.

3. Importance of the Constitutional Issue

In his petition, Mr. Garcia argued that the constitutional issue was of utmost importance because it thrust the United States into the role of a global policeman and invited other countries to assert their own law against United States nationals apprehended on the High Seas. In response, the government argues (opp. at 9) that it "is for the political branches, not petitioner or the courts, to balance such foreign policy

considerations." Petitioner agrees that it is up to the political branches to determine the *wisdom* of the MDLEA. Yet, it remains the province of this Court to determine the importance of the constitutional issue in the case. The very importance of the issue led prior courts to opine that the Framers of the Constitution would not have wished to grant Congress the unfettered power to determine which conduct by foreign nationals on foreign ships to criminalize. As the court in *United States v. Kessler*, No. 15,528 (C.C.D. Pa. 1829), warned long ago, "It is easy to see that this might get us into difficulties with other nations . . Questions and difficulties of this sort are avoided by confining our cognizance of offenses on the high seas to our own ships, leaving other nations to take care of their own." *Id.* at 774. And, the United States has protested to other countries when they have asserted jurisdiction over our citizens.[3] Moreover, as Justice Johnson admonished in *Palmer*, "Congress cannot make piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offenses." 16 U.S. at 641-42. Yet, according to the government, Congress can do just that as long as it labels the conduct a felony. Thus, the importance of the constitutional issue raised militates for review by this Court.

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[3] *See US presses Belgium over law on pursuing foreigners: report, Agence France-Press, Jan. 11, 2003; Cutting's Case*, 2 Moore, Digest of International Law 228-42 (1906).

CONCLUSION

For the foregoing reasons, as well as for those in the petition. Mr. Garcia requests this Court to grant the petition for certiorari.

Respectfully submitted,

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